Supreme Court, U. S.
FILED
JUL 16 1980
MICHAEL RODAK, JR., CLERK

80-118

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

KERRY P. DAY; RHETT G. CAMPBELL;
RICHARD D. HUFF; PETER H. LUKE;
PAUL M. SCOTT; JAMES A. TERHUNE;
and all others similarly situated,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kenneth M. Morris
1617 Marathon Building
600 Jefferson Avenue
Houston, Texas 77002
(713) 659-8697

July 16, 1980

QUESTIONS PRESENTED FOR REVIEW

1. Whether any Petitioner has been wrongfully denied his basic allowance for quarters to which he is statutorily entitled under 37 U.S.C. § 403(a).

2. Whether any Petitioner was assigned to government housing that was "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

   a. Whether Respondent can nullify any Petitioner's statutory entitlement to a basic allowance for quarters by assigning him to "any quarters."

   b. Whether the President ever authorized the payment of a basic allowance for quarters to any Petitioner who was not assigned to government quarters that were "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

   c. Whether the President ever authorized the Secretary of Defense and/or the Secretary of the Air Force to establish standards or criteria that would govern "appropriate to his

grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

d. Whether the Secretary of Defense and/or the Secretary of the Air Force ever established standards or criteria that govern "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

3. Whether Respondent can legally refuse to pay a Petitioner his statutory entitlement to a basic allowance for quarters when the Air Force real property records for the quarters to which a Petitioner was assigned officially classified the quarters as "inadequate" to "accommodate the function" of housing officers.

4. Whether Respondent can legally refuse to pay a Petitioner his statutory entitlement to a basic allowance for quarters when the quarters to which a Petitioner was assigned did not meet the "minimum adequacy standards" set forth in Department of Defense Instructions and/or Air Force regulations.

5. Whether Respondent can nullify a Petitioner's statutory right to a basic allowance for quarters by engrafting geographical exclusions or military exceptions upon the statute.

6. Whether the summary judgment evidence in the record demonstrates as a matter of law that 110 square feet was the sole governing standard for "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b) applicable to each Petitioner while he was stationed in Thailand.

LIST OF ALL PARTIES

Petitioners

This case has been certified as a class action in accordance with Rule 23(b)(3), FED. R. CIV. P., and notice has been given by mail to each class member.

Kerry P. Day, Rhett G. Campbell, Richard D. Huff, Peter H. Luke, Paul M. Scott, James A. Terhune, and

> all unmarried officers without dependents serving in the Department of the Air Force who were permanently stationed in Thailand

during some portion of the period from January 26, 1970 through January 26, 1976 and who were assigned to quarters of the United States or housing facilities under the jurisdiction of the Department of the Air Force

who have not opted out of the class are the Petitioners.

Respondent

The United States of America is the Respondent.

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(September 16, 1975) . . . . . xxxii, passim

388 Combat Support Group, Base Regulation 30-7 (January 10, 1975) xxix

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been officially reported. A copy of the Fifth Circuit's opinion appears in the Appendix hereto.

The opinion of the District Court for the Northern District of Texas is officially reported as Day v. United

States, 441 F.Supp. 165 (N.D.Tex. 1977). A copy of the District Court's opinion also appears in the Appendix.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 15, 1980. A timely petition for rehearing was denied on April 17, 1980, and this petition for certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under Section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Constitutional Provisions

1. U.S. CONST. art. I § 1.

> All legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives.

Statutes

1. 37 U.S.C. § 403 (1970), as amended, (Supp. 1980):

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates

prescribed in accordance with section 1009 of this title, according to the pay grade in which he is assigned or distributed for basic pay purposes.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniform service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. . . .

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

* * *

(j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty."

Regulations

1. Executive Order 11157, 29 Fed. Reg. 7973 (1964), reprinted in 37 U.S.C. § 301 (note) (Supp. 1980). [A-18].

* * *

Sec. 403. Any quarters or housing facilities under this jurisdiction of any of the uniformed services in fact occupied without

payment of rental charges . . . at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member. . . .

* * *

Sec. 407. The Secretaries concerned (within the meaning of section 101(5) of title 37 of the United States Code) [includes the Secretary of the Air Force], with respect to personnel of the uniformed services within their respective departments, are hereby authorized to prescribe such supplementary regulations not inconsistent herewith as they may deem necessary or desirable for carrying out these regulations, and such supplementary regulations shall be uniform for all the services to the fullest extent practicable.

2. Department of Defense Instruction No. 4165.47 (April 6, 1967). [A-26].

* * *

III. POLICY AND PROCEDURES

A. It is the policy of the Department of Defense that the housing accommodations assigned to personnel without dependents meet not only basic physiological needs, but also provide the space, privacy and housekeeping equipment and furnishings commensurate with the standard of housing available in the civilian economy with authorized basic allowance for quarters.

B. The Secretaries of the Military Departments and Directors of

Defense Agencies shall issue procedures containing the provisions of III. A., above, and the following:

1. For all permanently assigned commissioned officers, pay grades 01 and 02, and warrant officers, entitled to BAQ at the without-dependent rate, and all officers in a travel status, the authorized minimum standard in a permanent or semi-permanent facility will be unshared accommodations consisting of a combination sleeping/living room, and a bath. All residential-type quarters (Tri-Service Definitive and similar designs), including those with shared baths; and all apartment type quarters (two bedrooms, shared baths and living rooms) will be considered acceptable for this assignment at the occupancies for which designed.

2. For permanently assigned commissioned officers in grades 03 and above, the authorized minimum standard in a permanent or semi-permanent facility will be accommodations consisting of an unshared bedroom, living room and bath, and access to a kitchen/kitchenette (where a closed mess is provided in connection with a BAQ facility, kitchen access will not

be required). All residential-type quarters (Tri-Service Definitive and similar designs), including those with shared baths; and all apartment type quarters (two bedrooms, with shared baths and living rooms, with or without shared or unshared kitchens) will be considered acceptable for this assignment at the occupancies for which designed.

* * *

7. Military necessity may temporarily require the involuntary assignment of personnel to quarters below the standard of this Instruction. Personnel occupying quarters below these standards either voluntarily or involuntarily becase of the military necessity, will not be authorized payment of their basic allowance for quarters or full per diem.

* * *

Department of Defense Instruction No. 4165.47 (May 12, 1972). [A-31].

* * *

IV. POLICY

A. It is the policy of the Department of Defense that the housing accommodations assigned to bachelor personnel meet not only basic physiological needs, but also

provide the space, privacy and furnishings required for comfortable living.

B. The minimum standards of adequacy apply to all bachelor housing except for shipboard duty or field duty. Otherwise the minimum standards of adequacy of bachelor housing apply worldwide except when specific exceptions are made by the Head of the DoD Component concerned.

* * *

V. MINIMUM STANDARDS OF ADEQUACY

* * *

C. Temporary Construction. All temporary construction is considered to be inadequate unless specifically excepted by the Head of the DoD Component or his designee.

* * *

E. Application

1. Minimum standards of adequacy of existing inventory for permanent party personnel are contained in enclosure 1. [Grade 0-3 and above: Gross living area of 400 square feet with a living room, bedroom, private bath, access to kitchen or closed mess with the type of construction being perma-

nent or semi-permanent. Grade 01 and 02: Gross living area of 250 square feet with a sleeping/living room and private bath with the type of construction being permanent or semi-permanent.]

* * *

VI. OCCUPANCY

A. Military Necessity. Regardless of standards of adequacy or occupancy, military necessity is an overriding consideration in determining occupancy requirements. The following definition of "military necessity" is applicable:

> "Military necessity is defined as those military conditions or considerations which, in the judgment of the commanding officer, the activity commander, or the DoD Component concerned, as delegated by the Head of the DoD Component, require an individual to be billeted in a government owned or controlled facility in order that the mission assigned may be effectively accomplished."

* * *

VIII. BASIC ALLOWANCE FOR QUARTERS (BAQ)

A. Members without dependents who occupy adequate or inadequate bachelor quarters, either voluntarily or involuntarily, will not be authorized payment of their BAQ. . . .

4. Department of Defense Instruction No. 4165.47 (October 23, 1974). [A-41].

* * *

III. POLICY

A. The housing accommodations assigned to bachelor personnel shall meet basic physiological needs, and provide the space, privacy, and furnishings required for comfortable living.

B. The minimum standards for adequacy of bachelor housing, except for shipboard duty or field duty, shall apply world-wide unless specific exceptions are made by the Head of the DoD Component concerned.

* * *

IV. MINIMUM STANDARDS OF ADEQUACY

* * *

C. Temporary Construction. All temporary construction is considered inadequate unless specifically excepted by the Head of the DoD Component or his designee.

* * *

E. Application

1. Minimum standards of adequacy of existing inventory for permanent party personnel are contained in enclosure 1. [Grade 0-3 and above: Net living area of 400 square feet with a living room, bedroom, private bath, and access to kitchen or closed mess with the type of construction being permanent or semi-permanent. Grade 0-1 and 0-2: Net living area of 250 square feet with a sleeping/living room and private bath with the type of construction being permanent or semi-permanent.

* * *

V. OCCUPANCY

A. Military Necessity. Regardless of standards of adequacy or occupancy, military necessity shall be the overriding consideration in determining occupancy requirements when, in the judgment of the responsible commander, the billeting of an individual in a Government-owned or -controlled facility is required to bring about the successful conclusion of a military operation.

* * *

VII. BASIC ALLOWANCE FOR QUARTERS (BAQ)

A. Members without dependents who occupy adequate or inadequate bachelor quarters at their permanent station, either voluntarily or involuntarily, will not be authorized payment of BAQ.

* * *

5. Air Force Manual 87-18 (December 21, 1972). [A-51].

1-6. Explanation of Terms. For purposes of this manual the following terms apply:

* * *

d. Condition. The capability of the facility to accommodate the currently approved function.

e. Construction. The erection, installation, or assembly of a new facility; the addition, expansion, extension, alteration, conversion, or replacement of an existing facility; or the relocation of a facility from one installation to another. Includes equipment installed and made a part of the facility and the related site preparation, excavation, filling, and landscaping or other improvements made to the land.

(1) Permanent Construction. A facility suitable and appropriate to serve a specific purpose for a maximum period of time (at least 25 years) and with a minimum of maintenance.

(2) Semipermanent Construction. A facility suitable and appropriate to serve a specific purpose for limited period of time (less than 25 years but more than 5 years) and with a moderate to high degree of maintenance.

(3) Temporary Construction. A facility suitable and appropriate to fill a need for a short period of time (5 years or less) without regard to degree of maintenance and the designs and details of which provided minimum facilities with maximum initial economies.

f. Facility. A separate individual building, structure, or other real property improvement.

* * *

6. Air Force Manual 93-1 (January 15, 1964). [A-52].

* * *

Chapter 3

REAL PROPERTY ACCOUNTABLE RECORDS—ESTABLISHMENT, PREPARATION, AND MAINTENANCE

Section A—Real Property Accountable Records

* * *

3-2. Accounting Record Forms. AF Forms 1430 through 1443 and AF Form 1450, "Real Property Accountable Record—Supplemental Card", constitute the formal real property accountable records. . . .

Section B—Preparation of Real Property Records

3-3. General. The following general information will be entered on each real property record card maintained as part of the real property accountable record:

* * *

i. Category Code. Enter the basic item code as listed in Section E, AFM 85-27, which is most descriptive of the facility as presently designated. Present designation is to be based on original design if the facility has not been permanently converted. If the facility has been permanently converted, present designation will be the use for which it was permanently converted.

* * *

l. Condition. In line and block space, enter the appropriate term and corresponding code which describes the condition of the facility. (See AFM 87-18.)

* * *

o. Type of Construction. Show the type of construction of the building or facility, by appropriate description and code. (See AFM 87-18.)

7. Air Force Manual 300-4 (June 15, 1973). [A-54].

* * *

3. Definition/Explanation: Identifies the current state of a facility as to its physical condition and structural adequacy.

* * *

5.

Abbrv. Data Codes	Data Items and Explanations
1	Usable—Class A (Adequate)—Generally meets criteria. A facility which can be used to house the function for which currently designated through end position use with reasonable maintenance and without major alteration or reconstruction. Its functional adequacy, physical condition, structural adequacy, location, and adequate utility systems i.e., heating, air conditioning, ventilation, power, etc., are the major elements of the determination. The use of this code does not prohibit project work. However, any construction project will indicate either a change in use, conversion or addition.
2	Usable—Class B (Substandard)—Upgrading required and practical. A facility which is structurally sound, and

which is inherently capable of being raised to Usable—Class A standards for housing function for which currently designated by reasonable and practical expenditure of funds; i.e., alteration, soundproofing, relocation, strengthening, fire protection deficiency correction, air conditioning, heating, or mechanical ventilation.

3 Force Use (Substandard). A facility that cannot practically be raised to meet Usable--Class A standards for housing function for which currently designated, but which, because of necessity must be continued in use for a short duration, or until a suitable facility can be obtained. Its physical condition, location, lack of adequate utility systems or other overriding factors are such that the facility cannot be justifiably or economically improved and/or upgraded for that function. This definition is also applicable to a leased facility where the lease was

entered into as the only means by which the required space could be provided. This excludes leases which are advantageous to the Air Force for reasons of short duration of requirement, location, economics, etc., which will be Code 1.

4 Sterile—A facility which: (a) does not meet the condition classification Codes 1, 2, 3, or 5; (b) is excess to mission requirement in designed, changed, or converted use and is not, due to economic considerations, considered appropriate for disposal. The expenditure of maintenance funds on facilities in this classification is not authorized except for safety, health, and/or 'pickling' the facility. This code will apply to all facilities as they are vacated when the entire installation becomes excess of requirements.

5 Unusable—A facility which is no longer tenable for any purpose. It assumes that unsatisfactory or un-

safe conditions exist which render it unacceptable and useless for housing personnel, equipment or supplies. This designation cannot be applied until the facility is vacated and when applied, requires disposal action within 120 days. Classification of airfield pavements as unusable must be approved by Hq USAF.

NOTES:

1. The Real Property Condition Codes 1, 2, and 3 are applied based upon the capability of the real property facility to accommodate the function for which currently designated on the 1-HAF-Z17. Therefore, that code is no indication of the ability of the facility to accommodate a different function.

2. Although structural condition must be considered in ascertaining code to be assigned, it is not the sole factor. Location of the facility with reference to other facilities or to adverse environmental conditions (air, noises), functional layout, and condition of support utilities are equally important.

3. Facilities which would be Code 1 will not be assigned a Code 2 or 3 based only on inadequate size.

4. The Data Element, 'Forced Use,' was formerly the Element, 'In Use.'

8. Air Force Manual 30-7 (January 1, 1970). [A-57].

BACHELOR AND TRANSIENT QUARTERS,
AND GUEST HOUSES

Chapter 1
General Information

1-1. Terms Explained:

a. Adequate Quarters. Officer quarters and airman dormitories in which living accommodations assigned an individual meet the common and minimum standards of adequacy for occupancy established in this manual.

* * *

b. Basic Allowance for Quarters (BAQ). An amount of money, prescribed and limited by law, which an officer or airman receives to pay for quarters not provided by the Government.

* * *

p. Inadequate Quarters. Officer quarters and airman dormitories in which living accommodations assigned an individual do not meet the common and minimum standards of adequacy for occupancy established in this manual.

* * *

r. Military Necessity. Military conditions or considerations which, in the opinion of the installation commander, require an individual to live in Government-owned or controlled quarters. In the case of quarters to be occupied on a rental basis, military necessity means that, in the opinion of the installation commander,

necessary service cannot be rendered, or that property of the Government cannot adequately be protected, unless the individual occupies the quarters.

s. Minimum Adequacy Standards. Authorized standards which are mandatory in application, unless exceptions are otherwise covered in this manual.

Chapter 2
Adequacy Standards

* * *

2-2. Minimum Adequacy Standards. The minimum adequacy standards apply to Government-owned, controlled, or leased bachelor and transient quarters at all Air Force installations. Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations, or areas directly supporting these operations:

* * *

a. Officers and Authorized Comparable-Grade Civilian Employees.

* * *

(1) Bachelor Permanent Party and PCS Student Officers (Grades 0-3 and Above) and Authorized Comparable-Grade Civilian Employees. An apartment consisting of unshared living room, bedroom, and bath, with access to a kitchen/kitchenette (where an officer's field ration dining hall is

provided in connection with an OQ, kitchen/kitchenette access will not be required).

* * *

(2) Bachelor Permanent Party and PCS Student Officers (Grades 0-1 and 0-2) Warrant Officers, and Authorized Comparable-Grade Civilian Employees. An unshared combination sleeping/living room and bath.

Chapter 3

ASSIGNMENT AND TERMINATION OF OFFICER QUARTERS AND AIRMEN DORMITORIES

* * *

3-4. Assignment of Bachelor Quarters:

* * *

g. Military necessity may require the involuntary assignment of personnel to bachelor quarters below the standards prescribed by this manual. Bachelor military personnel and civilian employees occupying such quarters involuntarily because of military necessity, will not be authorized payment of BAQ/LQA.

9. PACAF Supplement AFM 30-7 (June 22, 1970). [A-88].

AFM 30-7, 1 January 1970, is supplemented as follows:

* * *

2-2. The minimum adequate standards listed in this basic manual apply only to Hawaii in the PACAF area. . . . SEA designation standard gross floor area will be adhered to in Thailand, Vietnam, and Ching Chuan Kang AB (that is, 70 sq. ft. for enlisted personnel and 110 sq. ft. for officer personnel excluding space for bathing and toilet facilities.)

10. PACAF Supplement AFM 30-7 (April 5, 1971). [A-94].

AFM 30-7, 1 January 1970, is supplemented as follows:

* * *

2-2. The minimum adequate standards listed in the basic manual apply only to Hawaii in the PACAF area. . . . SEA designation standard gross floor area will be adhered to in Thailand (except Don Muang) and Vietnam (that is, 70 sq. ft. for enlisted personnel and 110 sq. ft. for officer personnel excluding space for bathing and toilet facilities.)

11. PACAF Supplement AFM 30-7 (July 28, 1971). [A-101].

PACAF Supplement 1, 5 April 1971, to AFM 30-7, is changed as follows:

* * *

2-2. SEA designation standard gross floor area will be adhered to in Thailand (except Don Muang) and Vietnam; that is, 70 sq. ft. for enlisted personnel and 110 sq. ft. for officer personnel excluding space for bathing and toilet facilities.

12. Air Force Manual 30-7, CHANGE 1 (April 26, 1974). [A-105].

AFM 30-7, 1 January 1970, is changed as follows, and implements DOD Instruction 4165.57, 30 July 1973.

Chapter 2

ADEQUACY STANDARDS

* * *

* 2-2. Minimum Adequacy Standards. The minimum standards of adequacy apply to government-owned, controlled, or leased bachelor housing. They apply equally to military and civilian personnel of equivalent rank except where contracts with civilian personnel specifically define a standard of adequate housing to be provided. These standards will not be reduced without approval of this HQ USAF/DPXOH. Exception: Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations.

* a. Standards. Minimum standards of adequacy of existing inventory for Permanent Party/PCS student personnel are in table 2-1. [Grade 0-3 above: Gross living area of 400 square feet consisting of a private bedroom, private bathroom, living room (shared by not more than one other), and kitchen (shared by not more than one other) with the type of construction being permanent or semi-permanent. Grade 0-1 and 0-2: Gross living area of 250 square feet consisting of an unshared sleeping/living room combination, and private bath with the type of construction being permanent or semi-permanent.]

*(1) Temporary Construction. All temporary construction is considered to be inadequate. AFM 87-18, paragraph 1-6e, is the guiding directive for determining temporary construction. Personnel will not be

required to involuntarily occupy these quarters (except in oversea combat/contingency areas) without approval of HQ USAF/DPXOH.

13. 388 Combat Support Group, Base Regulation 30-7, para. 6a, page 2 (January 10, 1975).

The Base Commander has determined that military necessity requires the involuntary assignment of personnel to bachelor quarters . . . below standards prescribed in paragraph 2-1, AFM 30-7 (reference paragraph 3-4g, AFM 30-7).

14. Air Force Regulation 30-7 (May 12, 1975). [A-111].

BACHELOR HOUSING AND
TRANSIENT QUARTERS

Supersedes AFM 30-7, January 1970.

Chapter 1
GENERAL INFORMATION

1-1. Terms Explained:

a. Adequate Bachelor Housing/Quarters. Bachelor housing that meets the standards of adequacy for occupancy established in this directive.

* * *

g. Basic Allowance for Quarters (BAQ). An amount of money, prescribed and limited by law, which an officer or airman receives to pay for quarters not provided by the Government.

* * *

p. Inadequate Quarters. Officer quarters and airman dormitories in which living accommodations assigned an individual do not meet the common and minimum standards of adequacy for occupancy established in this directive.

* * *

r. Military Necessity. Military conditions or considerations which, in the opinion of the installation commander, require an individual to live in Government-owned or controlled quarters. In the case of quarters to be occupied on a rental basis, military necessity means that, in the opinion of the installation commander, necessary service cannot be rendered, or that property of the Government cannot adequately be protected, unless the individual occupies the quarters.

s. Minimum Adequacy Standards. Authorized standards which are mandatory in application, unless exceptions are otherwise authorized in this directive.

* * *

Chapter 2
ADEQUACY STANDARDS

* * *

2-2. Minimum Adequacy Standards. The minimum standards of adequacy apply to government-owned, controlled, or leased bachelor housing. They apply equally to military and civilian personnel of equivalent rank except where contracts with civilian personnel specifically define a standard of adequate housing to be provided. These standards will not be reduced without approval of HQ USAF/DPXVH. Exception: Oversea major commands may make appropriate

reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations.

a. Standards. Minimum standards of adequacy of existing inventory for Permanent Party/PCS student personnel are in table 2-1. [Grade 0-3 and above: Net living area of 400 square feet consisting of a private bedroom, private bathroom, living room (shared by not more than one other) and kitchen (shared by not more than one other) with the type of construction being permanent or semi-permanent. Grade 0-1 and 0-2: Net living area of 250 square feet consisting of an unshared sleeping/living room combination and private bath with the type of construction being permanent or semi-permanent]. When these quarters are available, Basic Allowance for Quarters (BAQ) will not be authorized. . . .

(1) Temporary Construction. All temporary construction is considered to be inadequate. AFM 87-18, paragraph 1-6e, is the prescribing directive for determining temporary construction. Personnel will not be required to involuntarily occupy these quarters (except in oversea combat/contingency areas) without approval of HQ USAF/DPXVH.

* * *

Chapter 3
ASSIGNMENT AND TERMINATION OF PERMANENT PARTY BACHELOR HOUSING

* * *

3-4. Assignment of Bachelor Housing:

* * *

e. * * *

Military necessity may require the involuntary assignment of personnel to bachelor housing below the standard prescribed by this directive. Bachelor military personnel and civilian employees occupying such quarters involuntarily because of military necessity will not be authorized payment of BAQ/LQA.

* * *

15. PACAF Supplement 1, AFR 30-7 (September 16, 1975). [A-142].

AFR 30-7, 12 May 1975, is supplemented as follows:

* * *

2-2. The minimum adequacy standards for bachelor quarters in Thailand and Korea are waived.

STATEMENT OF THE CASE

Each Petitioner is seeking to recover his statutory entitlement to a basic allowance for quarters ("BAQ") provided by 37 U.S.C. §403(a) (1970), as amended, (Supp. 1980)[1/] for the period of time from January 27, 1970 through and including January 26, 1976 during which each member of the class was permanently stationed in Thailand.

Section 403(a) provides in pertinent part that "a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters" at a monthly rate specified by statute.

Respondent has admitted that each Petitioner was "a member of a uniformed service" and was "entitled to basic pay" within the meaning of §403(a) while permanently stationed in Thailand. (R. 94)[2/].

1/ All statutory citations hereinafter used will refer to Title 37, United States Code, unless otherwise indicated.

2/ Petitioners have requested the Clerk of the Northern District of Texas to transmit the entire record to the Clerk of this Court.

Respondent has admitted that no Petitioner received any BAQ while permanently stationed in Thailand. (R. 94-95).

Sections 403(b) and 403(c) enunciate the only statutory exceptions or limitations to the general entitlement provided by §403(a).

Respondent has admitted that the §403(c) exception to §403(a), dealing with "field duty" and "sea duty", is inapplicable to each Petitioner. (R. 94).

The §403(b) exception to the general entitlement provided by §403(a) is the central issue in this case. Section 403(b) provides in pertinent part that "a member of a uniformed service who is assigned to quarters . . . appropriate to his grade, rank, or rating and adequate for himself, . . . is not entitled to a basic allowance for quarters."

Petitioners and Respondent both recognize that any Petitioner who was not assigned to quarters "appropriate to his grade, rank, or rating and adequate" within the meaning of §403(b) is entitled to BAQ and that any Petitioner who was so assigned is not entitled to BAQ. Petitioners and Respondent differ on the criteria that

defines "appropriate to grade, rank, or rating and adequate" within the meaning of §403(b) as applicable to Petitioners in this case.

Section 403(j), formerly §403(g), provides that the "President may prescribe regulations for the administration of this section, including definitions of the words 'field duty' and 'sea duty.'" Executive Order 11157 is the only attempt by the President to exercise the authority delegated to him by §403(j).

Section 403 of Executive Order 11157 provides in pertinent part that "[a]ny quarters or housing facilities . . . in fact occupied without payment of rental charges . . . at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member. . . ."

Relying on the "any quarters" provision of Executive Order 11157, Respondent first argued that each Petitioner was precluded from his statutory entitlement to BAQ because each was assigned to government housing and paid no rent. Petitioners argued that

Executive Order 11157 was invalid to the extent that it purported to make occupancy itself or "any quarters" coequal with the statutory criteria of "appropriate to his grade, rank, or rating and adequate." Both the District Court and the Fifth Circuit concurred with Petitioners and held that the "any quarters" provision of Executive Order 11157 is invalid.

The District Court and the Fifth Circuit, however, both held that:

1. The President through Executive Order 11157 delegated his authority to establish standards governing "appropriate to his grade, rank, or rating and adequate" within the meaning of §403(b) to the Secretary of Defense;
2. The Secretary of Defense exercised this delegated authority by promulgating the series of Department of Defense Instructions No. 4165.47;
3. The Secretary of Defense redelegated this authority to the Secretary of the Air Force;
4. The Secretary of the Air Force exercised this authority by promulgating Air Force Manual 30-7, and later, Air Force Regulation 30-7;

5. The Secretary of the Air Force redelegated this authority to his major commands to reduce the standards for given geographical areas and/or for military reasons; and

6. PACAF, an overseas major command, exercised this redelegated authority by promulgating the series of PACAF Supplements.

The District Court further held that the PACAF reductions in the minimum adequacy standards to 110 square feet and subsequent waiver of all standards were proper and constituted the sole criteria to which a court should turn in determining if a Petitioner's quarters were "appropriate to his grade, rank, or rating and adequate" within the meaning of §403(b).

The Fifth Circuit affirmed the PACAF reductions in the minimum adequacy standards to 110 square feet agreeing that these reduced standards were the sole criteria to which a court should look in determining if the statutory criteria were met. The Fifth Circuit, however, reversed the District Court's ruling that PACAF could waive all minimum adequacy standards.

Both the District Court and the Fifth Circuit refused to attribute any legal significance to the undisputed fact that 98.1% of the housing to which Petitioners were assigned while stationed in Thailand was officially classified as "inadequate" or "substandard" to "accommodate the function" of housing officers according to the Air Force real property records maintained in accordance with validly enacted Air Force regulations.

Petitioners respectfully submit that the Fifth Circuit:

1. Erred in stating that "[i]n Executive Order No. 11,157 § 407, the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services" to establish standards governing the § 403(b) exception to BAQ;

2. Erred in stating that the Secretary of Defense, the Secretary of the Air Force, and PACAF exercised "redelegated" authority to define adequacy "for BAQ purposes";

3. Erred in stating that the AF Forms 1430 are relevant to the present case only insofar as they can be "tied" to AFM 30-7 or AFR 30-7 by the express provisions of AFM 30-7 and AFR 30-7 themselves;

4. Erred in stating that the "purposes are different" insofar as they relate to BAQ for promulgation of ~~the AF Forms~~ 1430, AFM 30-7, AFR 30-7, and the PACAF Supplements; and

5. Erred in impliedly stating that the validity of the PACAF Supplements to govern BAQ was properly established by the summary judgment evidence in the record.

FEDERAL JURISDICTION

Section 1346(a)(2) of the Judicial Code, 28 U.S.C. §1346(a)(2), was the basis for federal jurisdiction in the United States District Court for the Northern District of Texas, which was the court of first instance.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioners submit that this Court should exercise its judicial discretion and grant a writ of certiorari

because of the special and important principles raised in this case. The criteria of Rule 17 of this Court are uniquely applicable here.

The Fifth Circuit itself recognized:

> The principles involved in this suit are of obvious importance.

The Iranian crisis, the Afghanistanian crisis, and the recent draft registration law have all accented the need for this country to develop and maintain a strong military. Military personnel and their compensation are inherently related to the development and maintenance of a strong military.

This case concerns Respondent's wholesale disregard of a statutory right granted to each of over six thousand Petitioners. This case involves the interpretation and legal effect of an Executive Order, Department of Defense Instructions, and Air Force Regulations in the light of the explicit Congressional commands embodied in 37 U.S.C. § 403.

Petitioners submit that the Fifth Circuit's opinion in this case conflicts with a Court of Claims decision involving essentially the same issues and further conflicts with two series of decisions of this Court.

First, the Fifth Circuit's opinion conflicts with the Court of Claims decision in Lischak v. United States, 202 Ct.Cl. 598 (1973). The Fifth Circuit's attempt to distinguish Lischak is utterly void of merit and emanates from an inherently faulty premise.

Second, the Fifth Circuit's opinion conflicts with Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); and United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), all holding that Respondent itself is bound by the standards established by validly issued governmental regulations.

Third, the Fifth Circuit's opinion conflicts with the principles set forth in Bell v. United States, 366 U.S. 393 (1961); United States v. Andrews, 240 U.S. 90 (1916); and United States v. Symonds, 120 U.S. 46 (1887), all concerning attempts by Respondent to deny or curtail a statutory entitlement belonging as a matter of law to a member of a uniformed service.

A review of the statutory and regulatory scheme that creates the highly critical issues raised in this case should highlight the necessity for the granting of the writ prayed for by Petitioners so that this Court may

receive full and complete briefing in resolving these issues and fully comprehending the interrelationships of the statute with the various regulations in question.

Statutory and Regulatory Scheme

a. Congress established a statutory entitlement to BAQ. [§ 403(a)]. Each Petitioner's statutory right to receive BAQ is solely a question of status. "The monthly pay of officers is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office. . . ." 13 OP. ATT'Y GEN. 103, 104. An officer cannot be divested of his pay and allowances through estoppel or waiver; for estoppels and waivers do not apply in the field of military compensation. United States v. Andrews, 240 U.S. 90 (1916).

> [I] t is to be observed that common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right.

Bell v. United States, 366 U.S. 393, 401 (1961).

b. Congress established an exception to the statutory entitlement if quarters were assigned that were "appropriate to grade, rank, or rating and adequate." [§ 403(b)]. Respondent cannot declare "adequate" for BAQ purposes housing that is in fact inadequate or substandard and thereby nullify a Petitioner's statutory right to BAQ. United States v. Symonds, 120 U.S. 46, 48-50 (1887) ("[T]hat order could not convert the services of Symonds from sea services into shore services, if they were, in fact performed when 'at sea'").

c. AFM 93-1 (Ex. 887), AFM 87-18 (Ex. 885), and AFM 300-4, ADE Re-009 (Ex. 888) are all validly enacted governmental regulations. Respondent has never denied that the Secretary of the Air Force had the authority to promulgate these regulations.

AFM 93-1, AFM 87-18, and AFM 300-4, ADE Re-009 required the maintenance of Air Force Forms 1430 ("AF Forms 1430") for each building designated for the housing of officers. All of the AF Forms 1430 are part of the appellate record.

The applicable provisions of these regulations are set forth verbatim at the outset of this petition. In short, these regulations established standards or criteria for determining if housing was "adequate" or "substandard" to "accommodate the function" of housing officers. "[F]unctional adequacy, physical condition, structural adequacy, location, and adequate utility systems" were "the major elements of the determination." AFM 300-4, ADE Re-009 at 4-161 [Ex. 888].

Both the District Court and the Fifth Circuit recognized that 98.1% of the buildings to which Petitioners were assigned was classified less than "adequate" on the AF Forms 1430.

In Lischak v. United States, 202 Ct.Cl. 598 (1973), the Court of Claims held that Lischak was entitled to his BAQ for the period during which he was assigned to housing officially classified as less than "adequate" on the AF Form 1430 applicable to the building to which he was assigned.

Petitioners submit that Respondent cannot deem "adequate" for BAQ purposes quarters that

are officially classified on the AF Forms 1430, kept in accordance with validly enacted regulations, as less than "adequate" to serve the specific function of housing officers.

> Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the administrative action under review is discretionary in nature.

Service v. Dulles, 354 U.S. 363, 372 (1957).

d. The Department of Defense Instructions, AFM 30-7, and AFR 30-7 delineated "minimum adequacy standards" for officers' housing. Few, if any, Petitioners were assigned to housing in Thailand that met these minimum adequacy standards.

Respondent contends that these minimum standards were reduced and subsequently waived in Thailand.

Petitioners submit that their statutory right to BAQ is not subject to divestiture through an administratively-imposed exclusion based upon geographical conditions or military necessity. This Court has consistently rejected administrative attempts to create geographical exclusions or

exceptions to statutory entitlements in the absence of explicit statutory authority. Morton v. Ruiz, 415 U.S. 199 (1974); Zuber v. Allen, 396 U.S. 168 (1969).

The legal conclusions of the courts below that extraneous exceptions can be imposed by administrative fiat upon Petitioners' statutory entitlement to BAQ is inconsistent with the statutory language and the concept of legal entitlements. "The contrary would be to hold that an executive department could annul and defy an act of Congress at its pleasure." Bell v. United States, 366 U.S. 393, 405 (1961).

e. Congress gave the President authority to prescribe regulations for the administration of § 403 that would include the authority to enact standards defining when quarters were "appropriate to grade, rank, or rating and adequate" within the meaning of § 403(b). [§ 403(j)].

f. Executive Order No. 11157 was the only attempt by the President to enact standards pursuant to § 403(j). The President stated that "any quarters

. . . in fact occupied without payment of rental charges . . . shall be deemed to have been assigned . . . as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member. . . ."

Executive Order No. 11157 delegated authority to the Secretary of Defense and the Secretary of the Air Force only to prescribe supplementary regulations not "inconsistent" with Executive Order No. 11157. Therefore, neither the Secretary of Defense nor the Secretary of the Air Force was ever delegated any authority to prescribe standards for BAQ pursuant to § 403(j).

g. Neither the Secretary of Defense nor the Secretary of the Air Force ever attempted to enact standards pursuant to § 403(j) that would define "appropriate to grade, rank, or rating and adequate" within the meaning of § 403(b). Neither ever had the authority to establish BAQ standards inconsistent with Executive Order No. 11157, and neither ever had the authority to authorize payment of BAQ if "any quarters" were assigned. Neither Department

of Defense Instruction No. 4165.47, nor AFM 30-7, nor AFR 30-7, nor the AF Forms 1430, nor the PACAF Supplements even purport to be enacted pusuant to § 403(j) or even purport to authorize payment of BAQ if the standards or criteria set forth in each are not met. Simply, no standards or criteria were ever promulgated pursuant to § 403(j) that defined when quarters would be considered "appropriate to grade, rank, or rating and adequate" within the meaning of § 403(b). The alleged need for any standards had been obviated by the "any quarters" provision in Executive Order No. 11157.

h. The Department of Defense Instructions 4165.47, AFM 30-7, and AFR 30-7 do not authorize the payment of BAQ if an officer is assigned to "any quarters", even if the quarters are inadequate.

> Members without dependents who occupy adequate or inadequate bachelor quarters, either voluntarily or involuntarily, will not be authorized payment of their BAQ. . . .
>
> Department of Defense Instruction 4165.47 (May 12, 1972 and October 23, 1974).

b. Basic Allowance for Quarters (BAQ). An amount of money, prescribed and limited by law, which an officer or airman receives to pay for quarters not provided by the government.

Air Force Manual 30-7 (January 1, 1970) and Air Force Regulation 30-7 (May 12, 1975).

These regulations were not intended to establish standards governing BAQ. The very nature of BAQ is misconceived. Each Petitioner has a statutory right to BAQ until that right is precluded by his assignment to housing that is "appropriate to his grade, rank, or rating and adequate."

The Department of Defense Instructions directly conflict with the statute and the Air Force regulations err in defining BAQ and when Congress demanded its payment.

i. Realizing that the "any quarters" provision in Executive Order No. 11157 was invalid, and both the District Court and Fifth Circuit have so held, and further realizing that no other standards were even purportedly enacted to govern BAQ, Petitioners recognized that a fact question was presented concerning whether the quarters to

which each was assigned in Thailand were "appropriate to his grade, rank, or rating and adequate" within the meaning of § 403(b).

In other words, with normal and plain word usage, were the quarters to which each was assigned "appropriate . . . and adequate" to serve their function of housing officers?

In answering this question, Petitioner turned to the only regulations concerning officers' housing that had been enacted by the Secretary of the Air Force, fully realizing that none of them purported to govern BAQ or to authorize payment of BAQ under any circumstances, in order to ascertain if the quarters were classified by the Air Force itself as adequate or fit to serve as officers' quarters.

j. The AF Forms 1430 (governed by AFM 93-1, AFM 87-18, and AFM 300-4, ADE Re-009), AFM 30-7, AFR 30-7, and the PACAF Supplements were found to be the only regulations enacted by the Air Force concerning whether housing was officially considered adequate or fit to serve its function of housing officers.

The AF Forms 1430 demonstrated that 98.1% of the buildings were officially classified as less than adequate (the same word found in the statute) "to accommodate the function" of housing officers. The AF Forms 1430 did indeed relate to the condition of the quarters.

AFM 30-7, AFR 30-7, and the PACAF Supplements established room and/or size standards referred to as the minimum adequacy standards. AFM 30-7 and AFR 30-7, from April 26, 1974 through January 26, 1976 also referred to adequacy of quarters in terms of "type of construction," an identical consideration of the AF Forms 1430.

Having examined the only regulations concerning the adequacy of the quarters to serve their purpose of housing officers, Petitioners realized that the Air Force itself had classified their quarters as inadequate to accommodate the function of housing officers.

Obviously, the Air Force did not intend that the adequacy standards set forth in either the AF

Forms 1430, or AFM 30-7, or AFR 30-7, or the PACAF Supplements would govern entitlement to BAQ. These regulations simply could not so provide without violating Executive Order No. 11157. But, the Air Force did intend, by the express provisions of its own regulations, to establish whether it considered the quarters adequate to house officers. The Air Force officially stated in documents compiled pursuant to its own regulations that Petitioners' quarters were inadequate to serve the function of housing officers. This determination answers the germane fact question that must be dealt with once it is recognized that no standards other than the "any quarters" standard of Executive Order No. 11157 were ever enacted by the Secretary of Defense or the Secretary of the Air Force pursuant to § 403(j).

k. Petitioners submit that a 110 square feet standard, a 250 square feet standard, or a 400 square feet standard, standing alone, would be unreasonable. Petitioners below did not focus on square footage per se because square footage is not the BAQ

standard. 110 square feet or 400 square feet of tent space in a rice paddy could hardly have been what Congress had in mind when it enacted § 403(b), particularly when the Air Force classified the square footage of what was actually assigned according to its own condition criteria as inadequate to accommodate the function of housing officers.

1. The Air Force is bound by its own determination pursuant to its own regulations that the quarters to which Petitioners were assigned were inadequate "to accommodate the function" of housing officers. The Air Force has never made any conflicting determination in any promulgated regulation that the quarters to which Petitioners were assigned were "adequate" for BAQ purposes. The Air Force itself simply had no occasion to consider adequacy or inadequacy, regardless of the size or condition of quarters, "for BAQ purposes" in light of the Presidential mandate in Executive Order No. 11157 that "any quarters . . . in fact occupied without payment of rental charges" precluded entitlement to BAQ.

Having set forth the statutory and regulatory scheme, Petitioners would now direct this Court's attention to the errors in the Fifth Circuit's opinion. Petitioners will address these points of error briefly to give this Court the flavor of the analysis hoping for the opportunity to address them more fully if the writ is granted.

The Fifth Circuit has written:

> In Executive Order No. 11,157 § 407, the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services. Pursuant to this directive the Secretary of Defense promulgated Department of Defense Instruction No. 4165.47 (April 6, 1967; revised May 12, 1972; revised October 23, 1974) defining the minimum standards of adequacy for bachelor officers' housing.

Opinion at 3287. [emphasis supplied].

Purely and simply, the Fifth Circuit seriously erred in stating that "[i]n Executive Order No. 11,157 § 407, the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services." The Fifth Circuit's subsequent legal reasoning flows solely from this inaccurate, erroneous factual statement, making it the single most critical error in the Fifth Circuit's entire opinion.

Executive Order No. 11157 never purported to delegate the Presidential authority found in § 403(j) to enunciate standards governing entitlement to BAQ to "the Secretary of Defense or the Secretaries of the various services." The explicit provisions of Executive Order No. 11157 itself highlight the erroneous nature of the Fifth's Circuit statement.

Executive Order No. 11157 provides in pertinent part:

> Sec. 403. Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member . . . .
>
> * * *
>
> Sec. 407. The Secretaries concerned . . ., with respect to personnel of the uniformed services within their respective departments, are hereby authorized to prescribe such supplementary regulations not inconsistent herewith as they may deem necessary or desirable for carrying out these regulations . . . . [emphasis supplied].

Executive Order No. 11157 delegated authority to the Secretary of Defense and the Secretaries of the various services, including the Secretary of the Air

Force, "to prescribe such supplementary regulations not inconsistent herewith" after already expressly stating that for purposes of § 403 "[a]ny quarters . . . in fact occupied without payment of rental charges . . . shall be deemed to have been assigned . . . as appropriate and adequate, and no basic allowance for quarters shall accrue . . . ." Never does Executive Order No. 11157 purport to redelegate Presidential authority under § 403(j) to the Secretaries of the various services to enunciate standards governing entitlement to BAQ.

In Executive Order No. 11157, the President intended to enunciate the "standard" governing entitlement to BAQ by providing that "[a]ny quarters . . . in fact occupied . . . shall be deemed to have been assigned . . . as appropriate and adequate, and no basic allowance for quarters shall accrue to such member . . . ." The Secretary of the Air Force could not have established fifty square feet of living space as the controlling standard for BAQ, which, if not met, would entitle a Petitioner to payment of his BAQ, without defying Executive Order No. 11157, without going beyond his authority, and without prescribing a regulation that

inherently would be "inconsistent" with Executive Order No. 11157.

Premised on the erroneous statement that "[i]n Executive Order No. 11,157 § 407 the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services," the Fifth Circuit then concluded that the Secretary of Defense through promulgation of Department of Defense Instruction No. 4165.47; the Secretary of the Air Force through promulgation of AFM 30-7 and later AFR 30-7; and PACAF through promulgation of the PACAF Supplements exercised this "redelegated" Presidential authority to establish standards or criteria defining "appropriate to grade, rank, or rating or adequate" within the meaning of § 403(b).

The faulty initial premise that the President "redelegated" his authority under § 403(j) to define BAQ standards permeates the Fifth Circuit's subsequent conclusions predicated on that premise thereby compounding the initial error.

Did the Secretary of Defense in promulgating the minimum adequacy standards delineated in Department

of Defense Instruction No. 4165.47; or the Secretary of the Air Force in promulgating the minimum adequacy standards delineated in AFM 30-7, or later in AFR 30-7; or PACAF in promulgating the 110, net square feet standard, intend to establish standards governing BAQ that were different or "inconsistent" with the express "any quarters" provision of Executive Order No. 11157? If so, where does either Secretary or PACAF derive this authority?

Did the Secretary of Defense, the Secretary of the Air Force, or PACAF authorize or even purport to authorize the payment of BAQ to a member of a uniformed service who was not furnished quarters meeting the "minimum adequacy standards" in Department of Defense Instruction No. 4165.47, AFM 30-7, AFR 30-7, or the 110 net square feet standard in the PACAF Supplements? If so, where is that purported authorization written or spelled out in the text of Department of Defense Instruction No. 4165.47, AFM 30-7, AFR 30-7, or the PACAF Supplements?

Could the Secretary of Defense, the Secretary of the Air Force, or PACAF have even purported to

authorize payment of BAQ to a member of a uniformed service who was assigned to quarters not meeting the "minimum adequacy standards" in Department of Defense Instruction No. 4165.47, AFM 30-7, AFR 30-7, or the 110 net square feet standard in the PACAF Supplements when the member was in fact assigned to "any quarters" without defying Executive Order No. 11157?

In short, only Executive Order No. 11157 even purported to exercise the Presidential authority granted under § 403(j) to enact standards defining "appropriate to grade, rank or rating and adequate" within the meaning of § 403(b). Executive Order No. 11157 only delegated authority to "prescribe supplementary regulations not inconsistent" with Executive Order No. 11157. The Secretary of Defense, the Secretary of the Air Force, and PACAF were all without authority to prescribe any standards governing BAQ. Neither the Secretary of Defense, nor the Secretary of the Air Force, nor PACAF ever stated that BAQ would be paid if the "minimum adequacy standards" or reduced standards were not met. Neither the Secretary of Defense, nor the Secretary of

the Air Force, nor PACAF ever purported to enact standards governing entitlement to BAQ. No supplementary regulation could have been lawfully prescribed by any of them "inconsistent" with the "any quarters" standard articulated in Executive Order No. 11157 itself.

The Fifth Circuit also wrote that the "minimum adequacy standards" set forth in Department of Defense Instruction No. 4165.47, AFM 30-7, and AFR 30-7, together with the PACAF Supplements reducing the "minimum adequacy standards" for Thailand to 110 net square feet, are the exclusive standards governing adequacy "for BAQ purposes." These regulations simply do not provide that they govern adequacy for BAQ purposes.

Having stated that the "minimum adequacy standards" and the PACAF reduced standards govern BAQ because they were allegedly enacted pursuant to authority redelegated by the President under § 403(j), a statement Petitioners have shown is erroneous, the Fifth Circuit concluded that the AF Forms 1430 are relevant to adequacy "for BAQ purposes" only insofar as they can be "tied" to AFM 30-7 or AFR 30-7 by the express provisions of AFM 30-7 or AFR 30-7 themselves.

First, the Fifth Circuit attempted to distinguish Lischak v. United States, 202 Ct.Cl. 598 (1973) by suggesting that Lischak was awarded his BAQ on the basis of the determination in the AF Form 1430 only because the August 1, 1967 edition of AFM 30-7 allegedly contained "a specific definition of 'adequate' and 'inadequate' quarters for BAQ purposes" [Opinion at 3290], whereas allegedly "the Air Force [during the period applicable to this case] cancelled the regulation that tied 'adequacy' for BAQ purposes to the real property records . . . ." [Opinion at 3290].

Simply, the August 1, 1967 edition of AFM 30-7 considered in Lischak made no more reference to "adequacy" "for BAQ purposes" than either the January 1, 1970 edition of AFM 30-7 or the May 12, 1975 edition of AFR 30-7 makes to "adequacy" "for BAQ purposes." The Lischak opinion does not even suggest that the August 1, 1967 edition of AFM 30-7 governed BAQ or that Lischak was awarded his BAQ because the AF Form 1430 was referenced in AFM 30-7. Lischak was awarded his BAQ because of the factual determination embodied in the AF Form 1430 that his quarters were officially

classified as less than adequate to house officers. The Secretary of the Air Force had no more authority in 1967 to enact standards governing BAQ that would have been "inconsistent" with the "any quarters" provision of Executive Order No. 11157 than the Secretary had in 1970 or in 1975 to enact "inconsistent" standards. Lischak simply cannot be accurately or justifiably distinguished on the basis that the August 1, 1967 edition of AFM 30-7 governed adequacy "for BAQ purposes" tying itself to the AF Forms 1430, whereas the tying arrangement for the present time period has been "cancelled." Nothing in the August 1, 1967 edition of AFM 30-7 purported to establish "adequacy" "for BAQ purposes" any more than the January 1, 1970 edition of AFM 30-7 or the May 12, 1975 edition of AFR 30-7 purported to establish "adequacy" "for BAQ purposes."

Adequacy "for BAQ purposes" has never been "tied" to the AF Forms 1430 through AFM 30-7 or AFR 30-7 any more than adequacy "for BAQ purposes" has been "tied" to AFM 30-7 or AFR 30-7 through the AF Forms 1430.

The factual determination, however, embodied in the AF Form 1430 that Lischak's quarters in Korea were officially classified as less than adequate "to accommodate the function" of housing officers is the identical factual determination embodied in the AF Forms 1430 applicable to 98.1% of the buildings to which Petitioners were assigned in Thailand.

Second, the Fifth Circuit attempted to nullify the legal effect of the finding evidenced by the AF Forms 1430 that 98.1% of the housing to which Petitioners were assigned was classified less than "adequate" to "accommodate the function" of housing officers by stating that "their purposes are different," referring to a distinction between the AF Forms 1430 [and the regulations governing them] and AFM 30-7 and AFR 30-7, even though both refer to "adequacy," the same word used in the statute. This conclusion is likewise premised upon the erroneous statement that the President "redelegated" his authority under § 403(j) to the Secretary of the Air Force who exercised this allegedly "redelegated" authority by enacting the "minimum adequacy standards" in AFM 30-7 and AFR 30-7 that constitute the exclusive criteria for "adequacy" "for BAQ purposes."

The Secretary of the Air Force did not intend the adequacy standards set forth in either the AF Forms 1430, or AFM 30-7, or AFR 30-7, or the PACAF Supplements would govern entitlement to BAQ. These regulations simply could not so provide without violating Executive Order No. 11157.

There is no more basis in the record for concluding that AFM 30-7, or AFR 30-7, govern BAQ to the exclusion of the AF Forms 1430 than there is for concluding that the AF Forms 1430 govern BAQ to the exclusion of AFM 30-7, or AFR 30-7. There is no basis in this record for concluding that the purpose of the AF Forms 1430 differs from the purpose of AFM 30-7, or AFR 30-7, insofar as any of these regulations evidence a purpose to govern BAQ.

The AF Forms 1430, however, here as in Lischak, expressly state that their purpose is to officially classify housing used for officers' quarters according to its fitness to "accommodate the function" of housing officers. The determination that 98.1% of Petitioners' housing was officially classified as less than adequate for the purpose of housing officers answers the germane

inquiry once it is recognized that no standards other than the "any quarters" standard of Executive Order No. 11157 were ever enacted by the Secretary of Defense or the Secretary of the Air Force pursuant to § 403(j).

Likewise premised on its erroneous conclusion concerning redelegation of authority to establish BAQ standards, the Fifth Circuit held that PACAF's reduction of the minimum adequacy standards in AFM 30-7 and AFR 30-7 for Thailand to 110 square feet constituted a controlling determination of adequacy for BAQ. The Fifth Circuit stated that the military might "take into account in considering adequacy [for BAQ purposes] . . . the facts of climate . . . [and] the military, economic and social environment in [Thailand]." [Opinion at 3291].

One, the Fifth Circuit failed to recognize that PACAF had authority to reduce the "minimum adequacy standards" for occupancy only because of military necessity. AFM 30-7, paras. 2-2, 3-4 at 2-1, 3-4 (1970); AFR 30-7, paras. 2-2, 3-4f at 2-1, 3-4 (1975).

Two, nothing in the record indicates that PACAF's purported reduction in the minimum adequacy standards

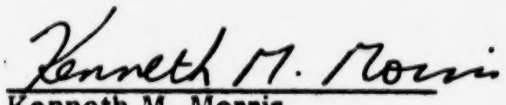
was intended to establish a new standard for BAQ or took into account the facts of climate and/or the military, economic, or social environment in Thailand, even if it be assumed that PACAF had any such authority.

Even if this Court should ultimately conclude that PACAF had "redelegated" authority under § 403(j) to establish standards governing BAQ applicable to Thailand based upon factors of climate, and/or the military, economic and social environment in Thailand, then a fact question is presented that should be determined on remand concerning whether PACAF did in fact establish the 110 net square feet standard intending that it govern BAQ after considering "the facts of climate [and] the military, economic and social environment in [Thailand]." This question has not been answered as a matter of law on the basis of any evidence in the record. The summary judgment is therefore unjustified and erroneous.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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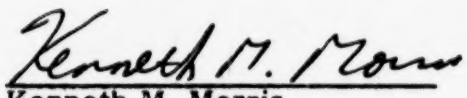
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 1980, three copies of this Petition for Writ of Certiorari were mailed postage prepaid, to Robert M. Hollis, U. S. Department of Justice, 550 11th Street N.W., #716-A, Washington, DC 20530, counsel for Respondent. I further certify that all parties required to be served have been served.



Kenneth M. Morris